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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AEDC FEDERAL CREDIT UNION, TENNESSEE CREDIT UNION LEAGUE and CREDIT UNION NATIONAL ASSOCIATION, INC.,

Petitioners,

v.

FIRST CITY BANK and TENNESSEE BANKERS ASSOCIATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether banks have standing under the Administrative Procedure Act to challenge the National Credit Union Administration's purported misapplication of the common bond provision of the Federal Credit Union Act, 12 U.S.C. § 1759, where the banks' interests are antithetical to the interests that Congress intended to protect through that statutory provision.

2. Whether the policy of the National Credit Union Administration that permits federal credit unions to consist of multiple occupational groups, each with its own common bond, is a permissible interpretation of the statute that Congress entrusted the agency to administer.

These two questions are the same questions on which this Court has granted certiorari in *National Credit Union Administration v. First National Bank and Trust Co., et al.*, (No. 96-843) and *AT&T Family Federal Credit Union and Credit Union National Association, Inc. v. First National Bank and Trust Co. et al.*, (No. 96-847).

PARTIES TO THE PROCEEDING

The parties below included the following:

The National Credit Union Administration ("NCUA"), defendant in the district court and appellee below, is the agency charged with administration and enforcement of the Federal Credit Union Act. NCUA is the petitioner in No. 96-843 before this Court.

First City Bank and the *Tennessee Bankers Association* brought this action against the NCUA. These parties were plaintiffs in the district court and appellants below.

AEDC Federal Credit Union ("AEDC"), *Tennessee Credit Union League* ("TCUL") and *Credit Union National Association, Inc.* ("CUNA") were permitted to intervene as defendants in the district court and were appellees below. CUNA is a petitioner in No. 96-847 before this Court. AEDC, TCUL and CUNA have no parent companies or nonwholly owned subsidiaries.

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AEDC Federal Credit Union, Tennessee Credit Union League and Credit Union National Association, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 111 F.3d 433 and is reprinted in the appendix hereto ("App.") at 1a. The District Court's order on standing is reprinted at App. 21a. Its opinion on the merits is reported at 897 F.Supp. 1042 and reprinted at App. 22a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 14, 1997. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

The pertinent provisions of the Administrative Procedure Act, the Federal Credit Union Act, and the agency ruling at issue appear at App. 33a-36a.

STATEMENT OF THE CASE

In this case, the plaintiffs First City Bank and the Tennessee Bankers Association (the "Banks") challenged, under the Administrative Procedure Act ("APA"), the approval by the National Credit Union

Administration ("NCUA") of certain amendments to the charter of AEDC Federal Credit Union ("AEDC"). Their challenge placed in issue a 1982 NCUA interpretive ruling and policy statement defining the scope of the "common bond" provision of Section 109 of the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1759, which regulates the membership of federal credit unions.

As the court below correctly concluded, Congress' purpose in enacting the FCUA was to promote the growth of credit unions. App. 3a. In 1982, NCUA effectuated that intent by setting forth a reasonable interpretation of the common bond provision which allows credit unions to consist of multiple unrelated employer groups, each with its own common bond. The court of appeals, however, overturned the agency's interpretation and substituted its own interpretation of ambiguous statutory language for that of the agency Congress entrusted to make such interpretations.

The court of appeals' ruling, if permitted to stand, will have precisely the opposite effect from that intended by Congress when it enacted the FCUA. Since 1982, NCUA's multiple group policy has been the primary basis for the growth in the membership of federal credit unions. The policy has allowed employers too small to sponsor a credit union of their own to become part of a pre-existing credit union and thereby offer their workers access to credit union services. At the same time, permitting credit unions to include multiple employer groups enables these financial institutions to diversify their membership base so that their safety and soundness is not threatened if a

particular sponsoring company closes or downsizes. Thus, the court's abrogation of NCUA's multiple group policy threatens to devastate the entire credit union industry. The net result of the court ruling will be to make credit union services unavailable to millions of workers who would otherwise have access to them, thereby thwarting Congress' acknowledged goals in enacting the FCUA.

1. Federal Credit Unions And the Common Bond Provision

A credit union is a cooperative organization formed for the purpose of "promoting thrift among its members and creating a source of credit for provident or productive purposes." 12 U.S.C. § 1752(1). Credit unions are distinctive in that the members of the credit union own and control the organization. 12 U.S.C. § 1757(6). Members purchase shares in the organization with their deposits and vote on such matters as election of directors, with each member receiving one vote regardless of number of shares. 12 U.S.C. §§ 1757(6), 1760. A credit union can also make loans and extend credit to its members and to other credit unions, but not to the general public. 12 U.S.C. § 1757(5). Deposits in federal credit unions are insured by the National Credit Union Share Insurance Fund.

Congress passed the FCUA in 1934, in the midst of the Great Depression, at a time when most individuals could not obtain loans at non-usurious interest rates and had no organized method for saving. *See* S. Rep. No. 555, 72d Cong., 2d Sess. 2 (1934). Many states already permitted the chartering of credit unions under state law, but

Congress believed this was inadequate. The Act was intended "[t]o establish a Federal Credit Union System * * * and to make more available to people of small means credit for provident purposes through a national system of cooperative credit * * *." Preamble to the Federal Credit Union Act, Pub. L. No. 73-467, 48 Stat. 1216 (1934).

The "common bond" provision of the FCUA is the focus of this action. It provides in relevant part that: "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community or rural district." 12 U.S.C. § 1759, App. 35a.

Congress included the common bond provision in the FCUA to encourage the effective and successful operation of credit unions. It saw the common bond provision as "the cement that united credit union members in a cooperative venture, and was, therefore, thought important to credit unions' continued success." *First National Bank and Trust Co. v. National Credit Union Administration,* 988 F.2d 1272, 1276 (D.C. Cir. 1993), *cert. denied,* 510 U.S. 907 (1993).

This action involves the common bond of "occupation" described in Section 109. NCUA and its predecessors, as a matter of policy, have equated "occupation" with employment. Thus, most "occupational" credit unions were organized by and for the employees of a particular company.

In 1982, NCUA adopted an interpretive ruling and policy statement (IRPS 82-1) permitting the granting of charters and charter amendments to

credit unions that desired to serve multiple unrelated employer groups, provided each group had its own common bond. 47 Fed. Reg. 16775 (1982), App. 36a. This policy "was intended to enable each FCU [federal credit union] to realize economies of scale and to facilitate occupational diversification * * * and [make] it possible for the employees of a company with fewer than 500 employees, the minimum for forming a new FCU, to join an existing FCU." *First National Bank and Trust Co. v. National Credit Union Admin.*, 90 F. 3d 525, 526-527 (D.C. Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (Feb. 24, 1997) (Nos. 96-843, 847) ("*FNBT*").

Over the past 14 years, NCUA's multiple group policy has been the primary engine for the growth in membership of federal credit unions. While relatively few new occupational credit unions have been formed since 1982 because of minimum size requirements and substantial start-up costs, about 3,500 federal credit unions have secured multiple group charters. These credit unions have absorbed about 156,000 separate employer groups and serve about 32 million individuals.

2. Proceedings Below

In 1994, twelve years after the issuance of IRPS 82-1 permitting multiple group credit unions, the Banks brought this action against NCUA challenging NCUA's approval of certain amendments to the charter of AEDC pursuant to the policy. The Banks claimed that these charter amendments violated the "common bond" requirement of Section 109 of the Act because there was not a single common bond uniting the members of all the groups.

AEDC, Tennessee Credit Union League and CUNA (the "Credit Unions") were granted leave to intervene as defendants on October 31, 1994. They filed, along with NCUA, a motion to dismiss the Banks' complaint on the ground of lack of prudential standing. On December 15, 1994, the court denied the motion based on the intervening decision of the Court of Appeals for the Sixth Circuit in *Community First Bank v. NCUA*, 41 F.3d 1050 (6th Cir. 1994). App. 21a.

Subsequently, in 1995, the Banks, NCUA and the Credit Unions filed cross motions for summary judgment on the merits. In deciding the motions, the district court employed the two-step process set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Court concluded under *Chevron* step 1 that Congress had not unambiguously addressed the precise issue presented and that the alternative readings of the common bond provision presented by the plaintiffs and defendants were both plausible. App. 25a-29a Proceeding to *Chevron* step 2, the Court concluded that NCUA's construction, as embodied in its multiple group policy, was reasonable because "Congress intended to promote the creation and growth of credit unions" and the policy furthered those goals. App. 30a-31a. Accordingly, it granted the motions for summary judgment filed by NCUA and the Credit Unions and denied the motion submitted by the Banks.

The Banks appealed.[1/] After the case had been fully briefed but before oral argument, the D.C. Circuit decided the *FNBT* case in which it held under *Chevron* step 1 that NCUA's multiple group policy was inconsistent with the plain meaning of the common bond provision of Section 109 of the Act. The Sixth Circuit agreed to accept supplemental briefs addressing the D.C. Circuit's decision and oral argument followed.

The Court of Appeals issued its opinion on April 14, 1997. The two-judge majority held that NCUA's multiple group policy was invalid, concluding that it was inconsistent with the common bond provision of Section 109. In doing so, however, the Court rejected the primary argument advanced by the Banks -- that the singular "a" in the phrase "groups having a common bond" unambiguously required that a single common bond unite all the members of a Federal credit union. App. 10a. The majority did not even discuss, and therefore presumably rejected, the D.C. Circuit's primary

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[1/]The Credit Unions did not file a cross-appeal of the district court's denial of their motion to dismiss for lack of standing. The Sixth Circuit's 1994 decision in *Community First Bank, supra,* was directly on point and upheld the standing of banks to sue to challenge NCUA's approval of applications to expand the charters of federal credit unions. The Credit Unions, however, reserved their right to challenge standing based on future changes in the law. *See* Credit Unions' Brief in *First City Bank v. National Credit Union Administration,* No. 95-6543 (6th Cir.), filed February 14, 1996.

rationale for finding the provision unambiguous -- that the word "groups" itself implies the existence of a common bond among members so that, to give meaning to the phrase "groups having a common bond," it was necessary to construe it as requiring that the members of all groups in the credit union share the same common bond.

Instead, the majority exclusively relied in its textual analysis on what it perceived as syntactical parallelism between the "occupational" common bond phrase and the "community" common bond phrase found later in the same sentence of Section 109. The sentence states that:

> Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.

The majority noted that NCUA requires all groups in a community-based credit union to be located in the same community, as opposed to in multiple communities. App. 10a. Despite the fact that the "community" phrase, unlike the occupational phrase of Section 109, contains the limiting requirement that the groups be "within" a particular well-defined community, the Court concluded that consistency required that the phrase describing occupational credit unions be interpreted to mean that all members must share a single common bond. App. 11a-12a. The majority also concluded that because NCUA's interpretation of the common bond provision does not preclude the joining

together of an infinite number of discrete groups, it would make the provision meaningless. App.12a.[2/]

The dissenting opinion of Judge Jones concluded, as had the district court, that the common bond provision was ambiguous because it was subject to different plausible interpretations. App. 13a. Judge Jones criticized the majority's reliance on the perceived parallelism of the occupational and community phrases on the ground that it "is reading more into the statute than the actual words suggest." App. 15a. He also criticized the majority for failing to follow the *Chevron* two-step analysis. He stated that the majority's statutory construction analysis had been improperly influenced by its assessment of the reasonableness of NCUA's policy. This assessment, he said, was properly the subject of *Chevron* step 2 and should not have affected the decision under Chevron step 1 whether Congress had unambiguously addressed the issue presented. App. 14a.

[2/]Petitioners filed a motion for a stay of the Court of Appeals' mandate on May 22, 1997 and a petition for rehearing on May 28, 1997. On June 9, 1997, the Court issued an order staying the issuance of its mandate pending the filing of a petition for a writ of certiorari. On June 18, 1997, the Court denied the petition for rehearing.

REASONS FOR GRANTING THE PETITION

On February 24, 1997, this Court granted the petitions for certiorari in *National Credit Union Administration v. First National Bank and Trust Co., et. al.*, (No. 96-843) and *AT&T Family Federal Credit Union and Credit Union National Association, Inc. v. First National Bank and Trust, Co., et. al.*, (No. 96-847), consolidating the two cases for argument. 117 S. Ct. 1079 (1997). The two questions presented in those cases are identical to the two questions presented in the instant petition. We therefore believe that there is no need for the Court to grant plenary review in this case as well, but that the Court should hold this case pending the outcome in *NCUA v. First National Bank and Trust Co.* and *ATTF v. First National Bank and Trust Co.*

CONCLUSION

This petition for a writ of certiorari should be held pending decision in *NCUA v. First National Bank and Trust Co.* (No. 96-843) and *ATTF v. First National Bank and Trust Co.* (No. 96-847), and then disposed of as appropriate in light of the decision in those cases.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 95-6543

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FIRST CITY BANK,
Plaintiff-Appellant,

TENNESSEE BANKERS ASSOCIATION,
Intervening Plaintiff-Appellant,

v.

NATIONAL CREDIT UNION ADMINISTRATION BOARD,
Defendant-Appellee,

AEDC FEDERAL CREDIT UNION, TENNESSEE CREDIT UNION LEAGUE, and CREDIT UNION NATIONAL ASSOCIATION, INC.,
Intervening Defendants-Appellees.

ON APPEAL from the United States District Court for the Middle District of Tennessee

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Decided and Filed April 14, 1997

Before: JONES, RYAN, and MOORE, Circuit Judges.

RYAN, J., delivered the opinion of the court, in which MOORE, J., joined. JONES, J. (pp. 13-20), delivered a separate dissenting opinion.

RYAN, Circuit Judge. The plaintiff, First City Bank, filed this action under the Federal Credit Union Act (FCUA), 12 U.S.C. §§ 1751-1795k, the Administrative Procedure Act, 5 U.S.C. § 706, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, challenging the National Credit Union Administration's (NCUA) interpretation of the FCUA. The Tennessee Bankers Association subsequently intervened as a plaintiff, and the AEDC Federal Credit Union, the Tennessee Credit Union League, and the Credit Union National Association intervened as defendants. The district court granted summary judgment for the defendants and intervenor-defendants, and the plaintiffs appeal arguing that the district court erred in concluding that the NCUA reasonably interpreted the FCUA to allow multiple occupational groups, each of which independently shares a "common bond," to join a single credit union. As we shall explain, we agree that the district court erred, and will reverse.

I.

A.

First City is a Tennessee banking corporation, and a member of the Tennessee Bankers Association, the principal state trade association for commercial banks in Tennessee. Defendant NCUA is an executive branch government agency responsible for regulating federally insured credit unions. *See generally* 12 C.F.R. Ch. VII. It was established in 1970 to "prescrib[e] rules and regulations for the organization and operation of federal credit unions." NATIONAL CREDIT UNION ADMINISTRATION, OFFICE OF EXAMINATION AND INSURANCE, FEDERAL CREDIT UNION HANDBOOK 2 (1988). Defendant AEDC Federal Credit Union is a federally chartered credit union. Defendants

Tennessee Credit Union League and Credit Union National Association are trade associations for credit unions in Tennessee and nationally, respectively.

Congress passed the FCUA, creating federal credit unions, in response to the failed banks, high interest rates, and diminished credit opportunities that were a hallmark of the Great Depression. *See T I Federal Credit Union v. DelBonis*, 72 F.3d 921, 931-32 (1st Cir. 1995). The purpose of the FCUA was to "establish a Federal Credit Unions System, to establish a further market for securities of the United States and to make more available to people of small means credit for provident purposes through a national system of cooperative credit, thereby helping to stabilize the credit structure of the United States." 12 U.S.C. § 1751, *reprinted in* CREDIT UNION NATIONAL ASSOCIATION, INC., LEGISLATIVE HISTORY OF THE FEDERAL CREDIT UNION ACT: A STUDY OF THE HISTORICAL DEVELOPMENT FROM 1934 TO 1980 OF THE STATUTE GOVERNING FEDERAL CREDIT UNIONS, *quoted in DelBonis*, 72 F.3d at 931. Thus, "[i]n effect, the Federal Credit Union Act created a localized and liberalized system of federal credit services," and FCUs

> enable the federal government to make credit available to millions of working class Americans. These organizations, often described as "cooperative association[s] organized . . . for the purpose of promoting thrift among [their] members and creating a source of credit for provident or productive purposes," provide credit at reasonable rates to millions of individuals who--because they lack security or, as recent studies show, reside in low income areas or in communities primarily inhabited by racial minorities--would otherwise be unable to acquire it.

DelBonis, 72 F.3d at 931-32 (citation omitted). As *DelBonis* suggests, then, the purpose of the FCUA was "to encourage the proliferation of credit unions, which were expected to provide service to th[e] would-be customers that banks disdained." *First Nat'l Bank & Trust Co. v.*

National Credit Union Admin., 988 F.2d 1272, 1275 (D.C. Cir. 1993) (*FNBT I*).

Under the FCUA, a federal credit union, or FCU, is owned and controlled by its members. 12 U.S.C. § 1757(6). An FCU can only make loans to and accept deposits from its own members and other credit unions. *Id.* § 1757(5).

Section 109 of the FCUA provides in pertinent part that

> Federal credit union membership shall be limited to *groups having a common bond of occupation* or association, or to groups within a well-defined neighborhood, community, or rural district.

Id. § 1759 (emphasis added). The issue presented in this case involves only the "common bond" requirement for occupational credit unions, and does not involve associational or community credit unions.

One court has observed that

> Congress assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default. . . . The common bond was seen as the cement that united credit union members in a cooperative venture, and was, therefore, thought important to credit unions' continued success.

FNBT I, 988 F.2d at 1276. Another court has described the purpose of the common bond provision somewhat differently, emphasizing the need of members to elect directors who will represent their interests:

> The purpose of the common bond provision is evident from the nature of the institutions created by the Act. A credit union has been aptly described as "a democratically controlled, cooperative, nonprofit

> society organized for the purpose of encouraging thrift and self-reliance among its members. . . . [It] is fundamentally distinguishable from other financial institutions in that the customers may exercise effective control." The union's purposes are threatened by directors that are unmindful of members' funds or unresponsive to their collective interests. Thus Congress ensured that federal credit unions would retain their character as self-managed cooperatives by establishing democratic principles of decision and control. The common bond provision reinforces this aim by advancing the formation of credit unions among groups that may realistically operate with unity of purpose. It encourages the election of directors who possess a common interest or occupation with the membership they serve.

Branch Bank & Trust Co. v. National Credit Union Admin. Bd., 786 F.2d 621, 626 (4th Cir. 1986) (citation omitted).

"From 1934 until 1982 the NCUA interpreted the common bond requirement to mean that the members of each occupational FCU . . . must be drawn from a single occupational group, defined to mean the employees of a single employer." *First Nat'l Bank & Trust Co. v. National Credit Union Admin.*, 90 F.3d 525, 526 (D.C. Cir. 1996) (*FNBT II*) (citing 58 Fed. Reg. 40473 (July 28, 1993)), *petition for cert. filed*, 65 U.S.L.W. 3416 (U.S. Nov. 26, 1996) (No. 96-843) *and petition for cert. filed*, 65 U.S.L.W. 3416 (U.S. Nov. 27, 1996) (No. 96-847). However, the NCUA had been tinkering with the common-bond requirement since 1967, gradually and consistently broadening the definition of the term. Finally, in 1982, the NCUA departed from its prior interpretation of the "common bond" language, and adopted a policy statement allowing multiple, or select, groups, each of which independently shared a common bond, to join together to form a credit union, so long as all the occupational groups "are located within a well defined area." Interpretative [sic] Ruling and Policy Statement (IRPS) 82-1, 47 Fed.

Reg. 16775 (Apr. 20, 1982). The NCUA stated that its purpose for the change was to "clarify NCUA's policy on membership in Federal credit unions, . . . and to ensure the continued availability of credit union service." *Id.* Other available information suggests that

> [t]he 1982 change of interpretation was intended to enable each FCU to realize economies of scale and to facilitate occupational diversification within the ranks of its membership. . . . The new policy also made it possible for the employees of a company with fewer than 500 employees, the minimum for forming a new FCU, to join an existing FCU.

FNBT II, 90 F.3d at 526-27 (citing Letter from E.F. Callahan, Chairman of the NCUA, to Congressman Fernand J. St. Germain, Chairman of the House Committee on Banking, Finance and Urban Affairs 8-9 (Oct. 28, 1983); IRPS 89-1, 54 Fed. Reg. 31165, 31171 (July 27, 1989)). The NCUA has continued to reiterate this position on the common-bond requirement, doing so most recently in 1994. *See* IRPS 89-1, 54 Fed. Reg. 31165 (July 27, 1989).

B.

First City originally filed suit against the NCUA in April 1994, seeking an order that the NCUA cease and desist from its current interpretation of the common-bond requirement. A credit union and two credit union trade associations--the AEDC Federal Credit Union, the Tennessee Credit Union League, and the Credit Union National Association, respectively--moved to intervene as defendants, and the Tennessee Bankers Association moved to intervene as a plaintiff. Both motions were granted. The plaintiffs then amended their complaint to include a request for invalidation of charter amendments expanding the membership base of AEDC, which amendments had been approved by the NCUA.

The parties filed cross-motions for summary judgment, and the district court ruled in favor of the defendants. *First City Bank v. National Credit Union Admin.*, 897 F. Supp. 1042 (M.D. Tenn. 1995). The court reasoned that "[t]he sole issue is the purely legal question of whether NCUA's select group policy is a valid interpretation of the FCUA's common bond provision," and concluded that its analysis was governed by the *Chevron* doctrine. *Id.* at 1043 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). The court concluded that both parties' "readings of the common bond provision are plausible. When an agency's interpretation is one of two plausible alternatives, the statute is ambiguous. Thus, the Court cannot discern Congress' precise intent of the common bond provision from the statutory language alone." *Id.* at 1044 (citation omitted). It also concluded that the legislative history was meager, and "expressed no intent on whether multiple groups with common bonds could join a single credit union." *Id.* at 1045. It nonetheless concluded that "NCUA's change to its select group policy was entirely consistent with the[] congressional goals of promoting the continued growth and stability of credit unions," and that the policy was justified because without it, many credit unions would not have survived. *Id.* at 1046.

The plaintiffs filed this timely appeal.

II.

Our review of the district court's grant of summary judgment, which was premised on a question of statutory construction, is *de novo*. *See Douglas v. Babcock*, 990 F.2d 875, 877 (6th Cir. 1993). The same rules of review apply where, as here, the parties have filed cross-motions for summary judgment. *See Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991).

III.

Our analysis hinges on an application of the administrative-law doctrine announced by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the Court explained as follows:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. *First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.* If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (emphasis added) (footnotes omitted). Step one of a *Chevron* analysis, then, is an inquiry whether the statute dictates a particular answer, while in step two, a court may proceed to considering the permissibility of the agency construction.

The plaintiffs contend that the issue may be resolved at *Chevron* step one because the FCUA statutory language is clear and unambiguous. The NCUA, on the other hand, argues that its reading of the FCUA must be upheld because it reasonably resolves an issue as to which the intent of Congress has not been clearly expressed, either by the plain language of the statute or in the legislative history; that is, it believes that a *Chevron* step two analysis is required, and that its interpretation is owed deference by

this court. Like the NCUA, the credit-union-intervenors believe that a *Chevron* step two analysis is necessitated because there is no basis for concluding that Congress had any intention with respect to the issue in this case. While contending that the literal language of the statute supports the NCUA's interpretation, they also argue that even if the plaintiffs' interpretation is plausible, that simply demonstrates that the statute is ambiguous, and the agency's interpretation is owed deference.

To reiterate, the statutory language in question is the following:

> Federal credit union membership shall be limited to *groups having a common bond of occupation or association*, or to groups within a well-defined neighborhood, community, or rural district.

12 U.S.C. § 1759 (emphasis added). The leading case, indeed the only court of appeals case, addressing the issue presented to this court, was decided only recently by the D.C. Circuit. *See FNBT II*, 90 F.3d 525. The D.C. Circuit concluded, under a *Chevron* step one analysis, that the statutory language and purpose were plain, and that the NCUA's interpretation of the statute stood in direct contradiction. We agree.

The parties offer various syntactical arguments in support of their positions. The plaintiffs argue that the statutory language is plain, since it requires every credit union to have "*a* common bond," which they read to mean a *single* common bond. The NCUA counters first by arguing that because the statute includes the word "groups," its multiple group policy constitutes a reasonable read; second by observing that the statute says "Federal credit union membership," as opposed to "membership in Federal credit unions," suggesting that the reference to plural "groups" was meant to be within a single credit union, not multiple credit unions; and third by pointing out that the statute does not say that the groups must "share" a common bond, a

word that it contends denotes mutuality, but only that the groups must "have" a common bond, suggesting that each group can separately have a common bond.

The *FNBT II* court considered and rejected similar, if not identical, arguments:

> [The plaintiff] contends, first, that the article "a" in the phrase "groups having a common bond" means that all members of an FCU must be united by a single occupation. The NCUA counters that the plural noun "groups" in the same phrase indicates that there may be multiple groups in an FCU, so that the statute makes sense only if it is understood to contemplate multiple bonds, each uniting a single group even if the same bond does not unite all groups, *i.e.*, the membership as a whole.

Id. at 527-28. Like the *FNBT II* court, we find all the parties' syntactical arguments to be unconvincing. *Id.* at 528. "The article 'a' could as easily mean one bond for each group as one bond for all groups in an FCU, and the plural noun 'groups' could refer not to multiple groups in a single FCU but to each of the groups that forms a credit union under the FCUA." *Id.*

The plaintiffs offer another basis for their position, however, and we find it far more persuasive. They argue that because the occupational clause ("limited to groups having *a* common bond of occupation") is followed directly by the community clause ("groups within *a* well-defined neighborhood, community, or rural district"), and because the two share the same syntactical structure, the two ought to be interpreted consistently. Therefore, since the NCUA only permits community-based credit unions to be based on membership in a single group from a single neighborhood, as opposed to multiple neighborhoods, the agency should apply the same interpretation to the occupation-based credit unions. The NCUA addresses this argument by asserting that the word "within" makes the difference; the statute

states that a credit union must be composed of "groups *within* a well-defined neighborhood," and it is the word "within" that necessitates the NCUA's policy that membership may not consist of groups from widely dispersed locales. The credit-union-intervenors, on the other hand, address the plaintiffs' "community" argument in an interesting way that the NCUA has not espoused: they contend that just because the NCUA has always interpreted the phrase to require membership from a single community does not mean that it *could not* employ a different interpretation, allowing multiple community groups to join together in a single credit union. The current interpretation, they reason, reflects a policy choice, not a statutory imperative.

The *FNBT II* court was presented with largely the same arguments, and sided with the analysis advanced by the plaintiffs here:

> [T]he term "groups" in the two parallel provisions of § 109 [of the FCUA]--permitting credit unions composed either of (1) "groups having a common bond of occupation" among all the members or of (2) "groups within a well-defined neighborhood, community, or rural district"--must be interpreted in a consistent way. If the so-called community provision were construed in a manner consistent with the NCUA's revised interpretation of the occupational provision, then a single FCU could include residents of any number of "well-defined neighborhood[s], communit[ies], or rural district[s]" around the country. Yet this expansive construction has never been advocated by the NCUA; on the contrary, the NCUA regulation implementing the community provision expressly requires that all FCU members live, worship, or work in "a single, geographically well-defined area."

Id. at 528-29 (citation omitted). We agree. It is a basic canon of statutory construction that phrases within a single

statutory section be accorded a consistent meaning. The only reasonable way to read these two phrases, one following on the heels of the other, is as the *FNBT II* court does. We simply reject the NCUA's focus on the word "within" as a distinguishing factor. And while we note the credit-union-intervenors' argument that the NCUA could, if it chose, interpret the community provision more broadly, we note too and we think it is significant that the NCUA itself does not make any such claim.

Finally, and perhaps most importantly, if the NCUA's interpretation is accepted, it would make the common-bond requirement meaningless. If credit unions are permitted to join together an infinite number of distinct groups, so long as each group has within it a common bond, it makes no sense to have the common-bond requirement at all; essentially the NCUA's interpretation would allow the joining together of many groups with completely diverse constituencies, basically obliterating any overall common bond. While we do not pretend to know the rationale behind the common-bond requirement--there being various possible explanations in a legislative history that all parties agree is ambiguous and unhelpful--we simply cannot conceive, and no one has suggested, any statutory rationale for requiring the type of "common bond" the NCUA has invoked.

IV.

Accordingly, we **REVERSE** the district court's judgment, and remand the case for further proceedings. On remand, the district court should address the credit-union-intervenors' argument that the plaintiffs' suit is barred by a six-year statute of limitations, a factually intensive claim that this court is ill-equipped to consider in the first instance.

NATHANIEL R. JONES, Circuit Judge, dissenting. This case involves the interpretation of the Federal Credit Union Act, a statute administered by the National Credit Union Administration ("NCUA"). I believe that the text of the common bond provision is ambiguous and that the district court properly determined that the National Credit Union Administration's ("NCUA") interpretation of the common bond provision is reasonable. Because I believe that this case must be examined under both prongs of the doctrine articulated in *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); I must respectfully dissent from the majority's opinion reversing the judgment of the district court. Instead, I would affirm the judgment of the district court.

The *Chevron* decision requires that courts undertake a two-step process in reviewing an agency's interpretation of a statute that it is entrusted to administer. The first step is to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If Congress has clearly addressed the issue, courts must "give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. If the court determines that Congress has not "directly addressed the precise question at issue," the court must then reach the second prong of the *Chevron* test and determine the reasonableness of the agency's interpretation of the statute. *Id.* This court has adopted the *Chevron* standard. *See e.g., Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1356 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 973 (1996); *Garcia v. Secretary of Health and Human Services*, 46 F.3d 552, 555 (6th Cir. 1995).

In the case at bar, the statutory provision at issue is ambiguous. The statute provides: "[f]ederal credit union membership shall be limited to groups having *a common bond of occupation or association.*" 12 U.S.C. § 1759 (emphasis added). In determining whether Congress has addressed the common bond requirement, this court should look to the plain meaning of the statute and the legislative

history. *See Chevron*, 467 U.S. at 859-63. Neither of these sources expresses the clear intent of Congress concerning the common bond provision.

Unlike the majority in this case and the D.C. Circuit in *First Nat'l Bank & Trust Co. v. National Credit Union Administration*, 90 F.3d 525 (D.C. Cir. 1996), *cert. granted*, 65 U.S.L.W. 3580 (U.S. Feb. 24, 1997) (Nos. 96-843, 96-847), I do not believe that the words of the statute clearly and unambiguously define the common bond requirement. The majority rejects the syntactical arguments raised by both parties and bases its decision on the relationship between the occupational clause and the community clause. Maj. Op. at 10. The majority concludes that because the two clauses have a similar syntactical structure, the "two ought to be interpreted consistently." *Id.* This is not clear from the words of the statute.

Although the majority contends that this is a *Chevron* step 1 case, the majority, nevertheless, utilizes a *Chevron* step 2 analysis. The majority's argument that the terms of the occupational and community-based clauses should be interpreted consistently goes to the reasonableness of the NCUA's interpretation of the statute rather than to a consideration of whether the words of the statute are clear on their face. In fact, the majority notes that "[t]he only reasonable way to read these two phrases, one following on the heels of the other, is as the *FNBT II* court does." Maj. Op. at 12. This is a *Chevron* step 2 analysis determining whether the NCUA's interpretation of the statute is reasonable. This syntactical argument does not support the position that the words of the common bond provision are clear on their face.

The common bond provision can be read one of two ways. Either the provision requires that each group in a credit union have a bond with the other groups in the credit union, or the provision requires that each group joining a credit union have a common bond among the members of

the group, but not necessarily a common bond with the other groups in the credit union. The statute does not clearly establish the unambiguous congressional intent concerning the common bond requirement and determine which reading of the statute is appropriate. I agree with the district court's conclusion that "[w]hen an agency's interpretation is one of two plausible alternatives, the statute is ambiguous." *First City Bank v. National Credit Union Admin.*, 897 F. Supp. 1042, 1044 (M.D. Tenn. 1995).

The language of the statute simply indicates that credit unions are to be formed based on common bonds of occupation or community. The words of the statute do not go so far as to define the limits of the common bond requirement. I believe that the majority's conclusion that the terms of the common bond provision and the community provision must be interpreted in exactly the same way is reading more into the statute than the actual words suggest. The statute does not define the contours of the common bond requirement and offers no clear answer to the question at bar. As a result, we must conclude that Congress has not "directly spoken to the precise question at issue."

In addition, the legislative history of the common bond requirement does not clarify the ambiguity in the words of the statute. I agree with the majority that the legislative history of the common bond requirement is murky at best and does not demonstrate a clear intention concerning the common bond provision.

This court has previously recognized that the NCUA is given the authority to regulate credit union membership. *Community First Bank v. National Credit Union Administration*, 41 F.3d 1050, 1055 (6th Cir. 1994). In *Community First Bank*, this court examined the regulations promulgated by the NCUA concerning community-based credit unions and concluded that the NCUA's regulations constituted a permissible interpretation of the word

"community." *Id.* While this court did not explicitly conduct a *Chevron* inquiry, it appears that the court concluded that the words of the statute were ambiguous because it engaged in a determination of whether the NCUA's interpretation of the word "community" was reasonable, the second prong of *Chevron. Id.* ("The NCUA's regulations defining 'community' (a clearly defined geographical area whose residents identify it as a distinct area) constitute a permissible definition of community."). I believe that a similar inquiry is necessary in this case, as we must decide whether the NCUA's interpretation of the common bond provision is reasonable.

Neither the words nor the legislative history of the common bond provision clearly evidence the intent of Congress. Therefore, it is necessary to determine whether the NCUA's interpretation of the common bond provision is reasonable. The interpretation of the common bond provision is embodied in an interpretive ruling rather than a regulation promulgated by the NCUA. An interpretive ruling is not entitled to the same amount of deference as given to a regulation. *Threlkeld v. Commissioner,* 848 F.2d 81, 84 (6th Cir. 1988). However, this does not mean that interpretive rulings are not entitled to any deference at all. In *CenTra, Inc. v. United States,* this court noted that an IRS revenue ruling is "entitled to some deference unless 'it conflicts with the statute it supposedly interprets or with that statute's legislative history or if it is otherwise unreasonable.'" 953 F.2d 1051, 1056 (6th Cir. 1992) (quoting *Threlkeld,* 848 F.2d at 84). The standard of "some deference" enunciated in *CenTra* is applicable to the NCUA interpretive ruling at issue in this case. While the NCUA's interpretive ruling is not entitled to presumptive deference, because it is an interpretive ruling rather than a regulation, it is, nevertheless, entitled to "some deference."

It is a clearly established legal principle that courts accord deference to an agency's interpretation of a statute that it is entrusted to administer. *See Chevron,* 467 U.S. at 842-45 (giving deference to the Environmental Protection

Agency's interpretation of the Clear Air Act Amendments); *Smiley v. Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1733 (1996) (giving deference to the regulations of the Comptroller of the Currency); *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1355 (6th Cir. 1994) (giving deference to the Secretary of Agriculture's amendments to the Agricultural Marketing Agreement Act of 1937), *cert. denied*, 116 S. Ct. 50 (1995). This deference is required even if the court would have reached a different conclusion than the administrative agency. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11 (citations omitted). Thus, this court cannot strike down the NCUA's interpretation of the common bond provision because it would have interpreted the clause differently; instead, we must give deference to the NCUA's interpretation as long as it is reasonable.

To determine the reasonableness of the NCUA's common bond policy, we must examine the policy within the context of the Federal Credit Union Act as a whole. *Chevron*, 467 U.S. at 864-65. The purpose of the Federal Credit Union Act as set forth in 1934 at the time of its enactment was to:

> establish a Federal Credit Union System, to establish a further market for securities of the United States and to make more available to people of small means credit for provident purposes through a national system of cooperative credit, thereby helping to stabilize the credit structure of the United States.

Federal Credit Union Act, Pub. L. 73-467, 48 Stat. 1216 (1934) (codified with some differences in language at 12 U.S.C. §§ 1751-1795). It is helpful to trace the socio-economic background of the credit union movement when looking to the reasonableness of the NCUA's interpretation of the common bond provision.

Credit unions experienced steady growth from the enactment of the Federal Credit Union Act in 1934 until the 1970's. At the end of the 1970's credit unions were hit with the impact of rising interest rates, which affected the entire financial services industry. A. Burger & T. Dacin, *Field of Membership: An Evolving Concept*, Center for Credit Union Research, University of Wisconsin-Madison School of Business, at 25 (2d ed. 1992). The rise in interest rates increased the competition for customers between banks and credit unions.

In 1979, the rate of growth was slowed at all financial institutions but credit unions were especially hard hit. *Id.* at 27. In the period of 1978-79, credit unions had changed from being the fastest growing financial institution in 1978 to the second slowest growing financial institution in 1979. *Id.* As a result of these economic considerations, many credit unions limited their consumer lending. *Id.* In 1981, an economic recession developed, which continued into 1982. *Id.* at 29.

The 1982 adjustment to the common bond policy was a response to the volatile economic conditions of the late 1970's and early 1980's. The revision of the common bond interpretation allowed groups to join existing credit unions if they did not have the number of members to make an individual credit union economically feasible. The revision protected against two potential problems. First, it allowed credit unions to shield themselves from the economic consequences of wide-spread layoffs or plant closings of a particular employer. Second, it allowed credit unions to create economies of scale to provide services to its members in the most cost effective manner available. Without the more expansive interpretation of the common bond provision many credit unions would have failed, and many other groups would not have been able to attain credit union services. These effects would have been clearly inconsistent with the Congressional intent to make credit available to those with limited means.

The NCUA is entrusted with the administration of federal credit unions. 12 U.S.C. § 1766(a). It is authorized to charter, examine, and prescribe rules and regulations for the administration of the Federal Credit Union Act. *Id.* In Interpretive Ruling and Policy Statement 82-1, the NCUA permitted occupational credit unions to accept members of different occupational groups as long as the following guidelines are met:

> 1) The occupational groups to be included (new charter) or added (amendment, merger, conversion) have specifically requested credit union service. 2) The applicant demonstrates that credit union service can be provided and that each group wishes to be served by the applicant. 3) All the occupational groups to be included (new charter) or added (amendment, merger, conversion) are located within a well defined area. 4) The applicant has adequately supported the proposal as economically feasible and advisable.

47 Fed. Reg. 16775 (1982). In addition, the NCUA Interpretive Ruling and Policy Statement 89-1 states:

> [a] select group of persons seeking credit union service from an occupational, associational or multiple group Federal credit union must have its own common bond. The select groups themselves may be either employee (occupational) groups or associational groups. However, a select group for expansion purposes cannot be defined by a common bond of community. The group's common bond need not be similar to the common bond(s) of the existing Federal credit union.

54 Fed. Reg. 31165, 31176 (1989). Each of these rulings was intended to clarify the interpretation of Sections 107(14) and 109 of the Federal Credit Union Act. 47 Fed. Reg. 16775, 16775 (1982); 54 Fed. Reg. 31165, 31165 (1989).

The common bond approach adopted by the NCUA is a reasonable policy choice in light of the economic circumstances discussed above. Therefore, it is entitled to deference by this court.

Finally, it is immaterial that the NCUA interpreted the common bond provision in the manner that the majority suggests from 1934 until 1982. The Supreme Court has noted:

> [o]f course the mere fact that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change . . . may be "arbitrary, capricious [or] an abuse of discretion. . . ." But if these pitfalls are avoided, change is not invalidating, since the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency.

Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1734 (1996) (citations omitted). Similarly in *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991), the Supreme Court rejected the idea that agency principles must last forever. The Court observed that agencies "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'" *Id.* (citation omitted). Agency policies are not etched in stone. An agency is permitted to change its policies to address continually changing circumstances. The NCUA's decision was not arbitrary or capricious nor was it an abuse of discretion. As a result, the change is not "invalidating."

We should **AFFIRM** the judgement of the district court determining that the NCUA's interpretation is reasonable under the two-step approach enunciated in *Chevron*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

3:94-0334

FIRST CITY BANK, Plaintiff,
and TENNESSEE BANKERS ASSOCIATION,
Intervening Plaintiff,

v.

NATIONAL CREDIT UNION ADMINISTRATION,
Defendant, and
AEDC FEDERAL CREDIT UNION, TENNESSEE
CREDIT UNION LEAGUE, and
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Intervening Defendants.

ORDER

Pursuant to a decision of the Sixth Circuit Court of Appeals in *Community First Bank, et al. v. National Credit Union Administration, et al.*, 93-2244, 1994 WL 677215 (6th Cir. December 5, 1994), the motions to dismiss for lack of standing filed in this case by the defendant and by the intervenors-defendants are hereby DENIED. The issue of standing of a bank to contest a decision of the National Credit Union Administration was decided in the cited case.

It is so ORDERED.

/s/ Thomas A. Wiseman, Jr.
Thomas A. Wiseman, Jr.
U.S. District Judge

[This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a), FRCP, on 12/15/94 By: /s/ mg]

APPENDIX C

UNITED STATES DISTRICT COURT,
M.D. TENNESSEE,
NASHVILLE DIVISION.

No. 3:94-0334.

FIRST CITY BANK, et al.

v.

NATIONAL CREDIT UNION ADMINISTRATION, et al.

Sept. 13, 1995.

Banking interests brought action challenging rule promulgated by the National Credit Union Administration under purported authority of Federal Credit Union Act allowing multiple unrelated groups to join same credit union as long as each group had common bond among its members. On parties' motions for summary judgment, the District Court, Wiseman, J., held that Administration reasonably interpreted "common bond" provision of Act to authorize its adoption of its "select group" membership policy.

Summary judgment for defendants.

* * * * *

Randall Steven Mashburn, Scott D. Carey, Baker, Donelson, Bearman & Caldwell, P.C., Nashville, TN, and Rodney M. Scott, Murfreesboro, TN, for plaintiffs.

Anne L. Weismann, Eric Johnson Mahr, Arthur R. Goldberg, Department of Justice, Civil Division, Washington, DC, William McMillian Leech, Jr., Michael Robert Paslay, Waller, Lansden, Dortch & Davis, Nashville, TN, Paul J. Lambert, Teresa Burke, Bingham, Dana & Gould, Washington, DC, and Brenda S. Furlow, Credit Union National Association, Inc., Madison, WI, for defendants.

MEMORANDUM

WISEMAN, District Judge.

Facts

Plaintiffs First City Bank and Tennessee Bankers Administration have brought suit against Defendants National Credit Union Administration ("NCUA"), AEDC Federal Credit Union ("AEDC"), Tennessee Credit Union League and Credit Union National Association, Inc., claiming NCUA incorrectly interpreted the "common bond" provision of the Federal Credit Union Act ("FCUA"), giving AEDC and other credit unions an unfair and illegal competitive advantage against banks. Both Plaintiffs and Defendants have filed for summary judgment.

The FCUA's common bond provision states, "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well defined neighborhood, community, or rural district." 12 U.S.C. § 1759. Until 1982, NCUA and its predecessor agencies interpreted this provision to require all members of a credit union to have a single common bond with one another. In 1982, however, NCUA changed its policy, promulgating a rule allowing multiple unrelated groups to join the same credit union as long as each group had a common bond among its members. 47 Fed.Reg. 16775 (1982).[1] Pursuant to this "select group" membership policy, NCUA approved AEDC's amended charters, allowing AEDC to expand its field of membership to include hundreds of disparate employee groups.

Plaintiffs claim NCUA's approvals of AEDC's charter amendments were improper because they were based on the

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[1] NCUA reaffirmed this policy without significant change in 1984, 1989 and 1994.

select group policy, which Plaintiffs believe is an illegal interpretation of the common bond provision. Plaintiffs have therefore requested the select group policy and NCUA's approvals of AEDC's membership groups based on this policy be set aside as abuse of discretion, pursuant to 5 U.S.C. § 706 of the Administrative Procedures Act ("APA"). Defendants counter that the select group policy constitutes a reasonable interpretation of the common bond provision and that NCUA therefore properly relied on this policy in approving AEDC's amended charters.

Discussion

No material questions of fact preclude summary judgment in this case. The sole issue is the purely legal question of whether NCUA's select group policy is a valid interpretation of the FCUA's common bond provision. The APA permits courts to review statutory interpretations of administrative agencies engaged in rulemaking. 5 U.S.C. § 706. The Supreme Court has articulated a two step process a court must follow in reviewing such interpretations. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). First, the court must determine if Congress has addressed the precise legal issue at hand. *Id.* If Congress has clearly addressed the issue, the court must give effect to the expressed congressional intent. *Id.* If Congress has not addressed the specific issue, the court must defer to any plausible agency interpretation. *Id.*[2] Applying the *Chevron* test to the case at hand,

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[2] The Sixth Circuit has endorsed the *Chevron* standard. *See, e.g., Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1356 (6th Cir. 1995); *Garcia v. Secretary of Health and Human Services*, 46 F.3d 552, 555 (6th Cir.1995); *Rowland v. U.S. Dept. of Agriculture*, 43 F.3d 1112, 1116 (6th Cir.1995); *Sharondale Corp. v. Ross*, 42 F.3d 993, 998 (6th Cir.1994); *Lansing Diary, Inc. v. Espy*, 39 F.3d 1339, 1349-51 (6th Cir.1994).

this Court finds Congress has not addressed the select group policy (*Chevron* step 1). However, the policy appears a reasonable one entitled to deference (under *Chevron* step 2).

CHEVRON STEP 1: Congressional Intent

In determining whether Congress has clearly addressed a legal issue, the Court must decide if the statute at issue has a plain meaning. *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781-82. To do this, the Court should consult relevant sources including (1) the statutory language and (2) the legislative history. *Id.* at 862-65, 104 S.Ct. at 2791-93.

Statutory language. The FCUA's common bond provision states, "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." 12 U.S.C. § 1759. Both Plaintiffs and Defendants argue that this language supports their respective positions.

Plaintiffs assert that the singular phrase, "a common bond", requires a single common bond exist among all members of each credit union. Defendants counter that the statutory language authorizes the inclusion of more than one group of membership in a single credit union because the singular term "credit union" is limited to "groups" having a common bond. Defendant NCUA additionally claims that the phrase "having a common bond" contains no connotation of mutual possession of characteristics among all groups, as would a phrase such as "sharing a common bond."

Both Plaintiffs' and Defendants' readings of the common bond provision are plausible. When an agency's interpretation is one of two plausible alternatives, the statute is ambiguous. 467 U.S. at 842-44, 104 S.Ct. at 2781-82. Thus, the Court cannot discern Congress' precise intent of

the common bond provision from the statutory language alone.[3]

Legislative history. The legislative history concerning the common bond requirement is quite meager. When Congress debated the FCUA, it did not explain the common bond provision in any detail. General Accounting Office, *Credit Unions: Reforms for Ensuring Future Soundness* 217 (1991) ("GAO Report").[4] Both Plaintiffs and Defendants cite only isolated portions of the record that they claim support their respective arguments.

In support of their position, Plaintiffs first point to a 1934 Senate Report that describes credit unions as "limited in each case to the members of *a specific group* with *a common bond* of occupation or association." S.Rep. No. 555, 73d Cong., 2d Sess. 2 (1934) (emphasis added). Plaintiffs also rely on a statement by Mr. Bergengren during the Senate Banking Committee hearings that "every credit union is organized within a limited and given *group* of people." *Credit Unions: Hearings on S. 1639, S. 1640 and S. 1641 before a Sub-Comm. of the Senate Comm. on Banking and Currency,* 73d Cong., 1st Sess. 31 (1933) (emphasis added).

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[3] Plaintiffs imply that reading the statutory language of the common bond provision to allow multiple groups to join a single credit union would permit the limitless growth of federal credit unions. There are, however, limits to credit union membership. Each occupational group in a credit union must "be employed by the same enterprise" or belong to the same association that has "common loyalties" and holds yearly meetings. 54 Fed.Reg. 31169. Other limits on the expansion of credit unions also exist. *See, e.g.*, 54 Fed.Reg. 31176.

[4] *See also NCUA Studies in Federal Credit Union Chartering Policy* 12 (1979) ("There is very little in the legislative history that can be characterized as a[n] insightful, analytic discussion of the essence of the [common bond] phrase, and of its intended scope and application"). Note that although this report was prepared by defendant NCUA, it predates the interpretive change at issue in this case by three years.

Plaintiffs claim these sources indicate Congress intended a single common bond exist among all members of each credit union. Both the Senate Report and Mr. Bergengren's remark, however, were apparently only explaining credit unions as they existed in the early 1930's. They were mere descriptions rather than exhaustive statements meant to define the outer contours of credit union membership.[5]

Defendants, in support of their position, rely on a House Report indicating that "membership in Federal credit unions is limited to *groups* having *common bonds* of occupation or association or to groups within well defined communities." H.R.Rep. No. 2021, 73rd Cong., 2d Sess. 3 (1934) (emphasis added). Defendants claim this plural reference to "groups" having "common bonds" demonstrates Congress intended to permit multiple groups to join a single credit union. However, the report's language is too vague to support such a proposition. The statement could have merely meant that credit unions *collectively* have groups with common bonds.[6]

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[5] Plaintiffs also point to a statement made by Congressman Stegall, Chairman of the House Banking Committee, during the original passage of the FCUA that, "The system loans on character, a thing greatly to be desired." 78 Cong.Rec. 12, 223 (1934). Plaintiffs assert that the enforcement of a single common bond requirement is the only measure that would insure sufficient unity of membership within credit unions to make loans based on character possible. However, while a single common bond among all members in each credit union might encourage loans based on character, NCUA's select group policy does not prevent credit unions from loaning on character. Plaintiffs overstate the value of a single common bond requirement by claiming it is the *only* way credit unions will be able to consider character when making loans.

[6] Defendants also claim the following conversation made by Congressmen debating the FCUA supports their position:

> Mr. Knutson: Will this legislation take care of small business men who have one or two clerks?

Defendant NCUA additionally points to congressional inaction many years after the FCUA's passage that they claim demonstrates Congress has addressed and approved the select group policy. In 1970, Congress mandated that NCUA "provide more flexible and innovative regulation" in the face of changing economic conditions. S.Rep. No. 91-518, 91st Cong., 2d Sess. (1970) U.S.Code Cong. & Admin.News 1970, pp. 2479, 2481. In accord with this mandate, NCUA liberalized its interpretation of the common bond provision several times prior to adopting the select group policy. Congress did not object to any of these revisions or to the crucial 1982 revision. Although NCUA, lobbyists from the banking industry and the GAO repeatedly informed Congress of NCUA's select group policy, Congress failed to alter the common bond provision in the ten times it amended the FCUA since becoming aware of the select group policy. These facts, asserts NCUA, prove Congress intended to allow multiple groups to join a single credit union.

However, examining postenactment history of a statute to determine precise legislative intent is problematic. "Subsequent legislative history", as several courts have noted, is an oxymoron. *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 566-68, 108 S.Ct. 2541, 2550-51, 101 L.Ed.2d 490 (1988); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132, 95 S.Ct. 335, 353, 42 L.Ed.2d 320 (1974); *Continental Can Co. v. Chicago Truck Drivers*, 916 F.2d

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Mr. Luce: I have no reason to believe that they cannot join the union and profit thereby.

78 Cong.Rec. 12218, 12225 (1934).

The precise meaning of Congressman Luce's statement, however, is unclear. It could simply mean that employees of small businesses could join regionally defined credit unions rather than occupationally based ones.

1154 (7th Cir.1990). The hazards inherent in examining legislative history generally[7] are exacerbated when the views of a subsequent Congress are imputed to an earlier Congress that enacted a given statute. *See, e.g., Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 100 S.Ct. 2051, 2060, 64 L.Ed.2d 766 (1980). Although the Supreme Court has not consistently rejected arguments relying on subsequent congressional action to define statutory terms, the Court most recently asserted that, as a general matter, failed legislative proposals and other congressional inaction lack "persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Central Bank v. First Inter. Bank*, ___ U.S. ___,___-___, 114 S.Ct. 1439, 1453, 128 L.Ed.2d 119, 138-39 (1994). In the instant case, attributing inaction by recent Congresses to the Congress that enacted the FCUA would be especially inappropriate, given the great lapse of almost fifty years between the enactment of the FCUA and NCUA's subsequent select group interpretation. Thus, this Court finds Congress expressed no intent on whether multiple groups with common bonds could join a single credit union. Because the statutory language and contemporaneous legislative history do not support a finding that Congress had an intent on the select group policy when it enacted the FCUA, the Court must move to step two of the *Chevron* analysis.

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[7] Critics say that legislative history is written by staffers rather than Congress itself; that it is easily manipulated; that it complicates the tasks of execution and obedience; and that it often is shaped by members of Congress who cannot achieve passage of a desired interpretation in the actual text of an enacted statute. *See, Matter of Sinclair*, 870 F.2d 1340, 1342-44 (7th Cir. 1989); *See also*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S.Cal. L.Rev. 845, 845-847 (1991) (describing various attacks on legislative history, but defending its use when judges are faced with unclear statutory language).

CHEVRON STEP 2: Reasonableness of NCUA's Interpretation

Because Congress did not directly address the select group policy, the next inquiry becomes whether NCUA reasonably interpreted the common bond provision when it established this policy. To determine the reasonableness of NCUA's construction, the Court should examine the policy and goals of the FCUA. *See Chevron,* 467 U.S. at 864-65, 104 S.Ct. at 2792-93.[8]

Viewing the FCUA in its entirety reveals Congress intended to promote the creation and growth of a stable national credit union system. For example, the Senate Committee on Banking and Currency stated the FCUA was designed to eliminate impediments retarding the growth of credit unions. S.Rep. No. 555, 73d Cong., 2d Sess. 2 (1934). The Committee also stated the FCUA would help establish a national system of cooperative credit for the "masses of people" whose buying power was dissipated by the Depression. *Id.* at 2-4. Floor comments also show Congress' intent to promote the extensive growth of credit unions. For example, Congressman Sheppard recognized "the general merit of credit unions, their extraordinary record during the depression, and the value of rapid credit-union extension." 78 Cong. Rec. 7259 (1934). Thus, the legislative history supports the view that Congress intended the FCUA to promote credit union expansion and stability.

NCUA's change to its select group policy was entirely consistent with these congressional goals of promoting the

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[8] Plaintiffs assert that NCUA's select group policy is an unreasonable interpretation of the FCUA merely because the policy represents a departure from NCUA's pre-1982 interpretation of the common bond provision. An agency may, however, in light of changed circumstances, alter its interpretative policy views, so long as the altered views are reasonable statutory constructions. *Rust v. Sullivan,* 500 U.S. 173, 186, 111 S.Ct. 1759, 1768-69, 114 L.Ed.2d 233 (1991); *Chevron,* 467 U.S. at 863-64, 104 S.Ct. at 2791-92.

continued growth and stability of credit unions. In the years following passage of the FCUA, both Congress and the NCUA viewed a narrow interpretation of the common bond requirement as necessary to effectuate the purpose of insuring financial stability. GAO Report at 215-19. Drastic economic changes over the years, however, necessitated changes in the common bond interpretation. By the late 1960's, credit unions faced increasing challenges as commercial banks and other financial institutions began aggressively competing for new customers. *Id.* at 227-28. With the rising interest rates and spiraling inflation of the 1970's, competition for customers increased as consumers sought the best returns on savings and the lowest interest rates on loans. *Id.* By the recessionary period of 1980-82, credit union loans had declined for the first time since World War II, and the number of credit unions in existence was also declining. A. Burger & T. Dacin, *Field of Membership: An Evolving Concept,* Center for Credit Union Research, University of Wisconsin-Madison School of Business, at 30, 36 (2d ed. 1992) (''Burger & Dacin''). Against this volatile economic backdrop, NCUA implemented its select group policy to protect credit unions by allowing them to diversify against economic troubles that might befall the single common bond group of each credit union. Burger & Dacin at 38. The policy helped many credit unions to compete and survive. GAO Report at 3, 9. Had NCUA not implemented the select group policy, many credit unions might have collapsed. Thus, NCUA's select group policy was a reasonable interpretation of the common bond provision, given Congress' goals of promoting credit union growth and stability.[9] Therefore, because NCUA's select group policy is a reasonable interpretation of the common bond provision, the Court must give it deference.

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[9] As stated earlier, although NCUA, lobbyists from the banking industry and the GAO repeatedly informed Congress of NCUA's select group

Conclusion

Congress did not address the precise issue of whether the FCUA's common bond provision permits multiple groups to join a single credit union as long as each group has a common bond among its members. Because Congress did not address this issue, the Court will defer to NCUA's reasonable select group interpretation. Because the select group policy is a legal interpretation of the common bond provision, NCUA properly relied on it in approving AEDC's amended charters. Thus, the Court grants defendants' motions for summary judgment.

ORDER

Plaintiffs have brought suit claiming the National Credit Union Administration incorrectly interpreted the "common bond" provision of the Federal Credit Union Act, giving the AEDC Federal Credit Union and other credit unions an unfair and illegal competitive advantage against banks. Both Plaintiffs and Defendants have moved for summary judgment. For reasons detailed in the accompanying Memorandum, this Court defers to NCUA's interpretation of the common bond provision. Plaintiff's motion for summary judgment is denied, and Defendants' summary judgment motions are granted.

It is so ORDERED.

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policy, Congress failed to alter the common bond provision in the ten times it amended the FCUA since becoming aware of the select policy. Such congressional inaction, while not necessarily indicative of Congress' precise intent in enacting the common bond provision, is at least some evidence of the reasonableness of the select group policy. *See, e.g., United States v. Riverside Homes, Inc.,* 474 U.S. 121, 137, 106 S.Ct. 455, 464, 88 L.Ed.2d 419 (1985); *Walls v. Waste Resources Corporation,* 823 F.2d 977, 980 (6th Cir.1987) (stating that while subsequent legislative history may not be dispositive as to congressional intent, it nonetheless provides useful guidance in determining statutory meaning in unsettled areas of law).

APPENDIX D

5 USC § 702

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 7--JUDICIAL REVIEW

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Current through P.L. 104-207, approved 9-30-96

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2)

confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

APPENDIX E

12 USC § 1759 (Section 109 of the FCUA)

UNITED STATES CODE ANNOTATED
TITLE 12. BANKS AND BANKING
CHAPTER 14--FEDERAL CREDIT UNIONS
SUBCHAPTER I--GENERAL PROVISIONS

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Current through P.L. 104-207, approved 9-30-96

§ 1759. Membership

Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Board, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district. Shares may be issued in joint tenancy with right of survivorship with any persons designated by the credit union member, but no joint tenant shall be permitted to vote, obtain loans, or hold office, unless he is within the field of membership and is a qualified member.

APPENDIX F

RULES and REGULATIONS

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701, 707, 708, and 745

[NCUA IRPS 82-1]

Membership in Federal Credit Unions; Interpretative Ruling and Policy Statement

Tuesday, April 20, 1982

AGENCY: National Credit Union Administration (NCUA).

ACTION: Interpretative ruling and policy statement.

SUMMARY: The NCUA Board has adopted a policy statement clarifying its interpretation of Sections 107(14) and 109 of the Federal Credit Union Act (12 U.S.C. 1757(14) and 1759) to (1) permit a Federal credit union, which purchases the loans of a liquidating credit union, to offer membership to the borrowers whose loans have been purchased, and (2) authorized the granting of charters, charter amendments, conversions to Federal charters, and mergers to credit unions which desire to serve multiple occupational groups. This action was taken in response to interest expressed by credit unions. It is intended to clarify NCUA's policy on membership in Federal credit unions, to make portfolios of loans sold by the National Credit Union Share Insurance Fund more attractive to potential Federal credit union purchasers,

and to ensure the continued availability of credit union service.

EFFECTIVE DATE: April 1, 1982.

ADDRESS: National Credit Union Administration, 1776 G Street, NW., Washington, D.C. 20456.

FOR FURTHER INFORMATION CONTACT:

Charles Filson, Director, Office of Programs, at the above address or telephone (202) 357-1130.

Interpretative Ruling and Policy Statement (IRPS) 82-1

a. A Federal credit union which purchases the loans of a liquidating credit union may offer full membership rights and services to the borrowers whose loans it has purchased. Accordingly, the purchasing Federal credit union must apply for and obtain an appropriate amendment to section five of its charter.

b. With respect to applications or requests for multiple occupational type Federal credit union charters, charter amendments, conversions to Federal charters, and mergers, the NCUA Board hereby authorizes the NCUA Regional Directors to approve or disapprove these applications/requests in accordance with the following guidelines.

1. The occupational groups to be included (new charter) or added (amendment, merger, conversion) have specifically requested credit union service.

2. The applicant demonstrates that credit union service can be provided and that each group wishes to be served by the applicant.

3. All the occupational groups to be included (new charter) or added (amendment, merger, conversion) are located within a well defined area.

4. The applicant has adequately supported the proposal as economically feasible and advisable.

In all cases of disapproval of a select employee group application, the Regional Director will advise the applicant of the reason(s) for disapproval and of the right to appeal the decision to the NCUA Board.

By the National Credit Union Administration Board, April 1, 1982.

Dated: April 12, 1982.